

1990

# Republicanism and the Preference Problem

Cass R. Sunstein

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Cass R. Sunstein, "Republicanism and the Preference Problem," 66 Chicago-Kent Law Review 181 (1990).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# REPUBLICANISM AND THE PREFERENCE PROBLEM

CASS R. SUNSTEIN\*

## INTRODUCTION

To many contemporary observers, the ratification of the American Constitution marked the end of classical politics and the start of a distinctive modern approach.<sup>1</sup> On that approach, government takes people as they are. Above all, it is respectful of divergent conceptions of the good life. Recognizing that self-interest is often the basis of political behavior, it creates institutional arrangements and substantive rights that will discipline likely abuses of political power, increase the prospects for compromise, and create spheres of private autonomy into which government may not enter. Agnostic about the good, a modern polity creates the basic rules by which people can order their private affairs. Its ambitions are otherwise quite modest.

This approach is often contrasted with another set of understandings, sometimes denominated "republican." For republicans, the polity is supposed to benefit from and to inculcate civic virtue in its people. The character of both the individual and the collectivity, and the enjoyment of the good life, properly conceived, are self-conscious concerns of the system. From the standpoint of modern observers, such systems threaten totalism, or the imposition of a "comprehensive view"<sup>2</sup> on the population. On the republican account, however, collective engagement with individual character and the good life are crucial parts of politics.

Republicans also put a high premium on active citizen participation in public affairs. The classical republicans placed little reliance on the

\* Karl N. Llewellyn Professor of Jurisprudence, University of Chicago Law School and Department of Political Science. Some of the arguments in this essay are also set out in Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (Winter 1991) and in C. Sunstein, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (Harvard University Press 1990). I am grateful to George Loewenstein, Jane Mansbridge, and Frederick Schauer for helpful comments.

1. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1972); T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988); Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* (R. Horowitz ed. 1979).

As the discussion below should make clear, I do not by any means intend to endorse all of the details of this account. There is reason to question both the picture of "classical republicanism" and the claims about the nature of the shift in America. But these issues raise questions beyond the scope of the present discussion.

2. See Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

protection of "rights" against the government. Indeed, these very categories would seem a bit puzzling to the classical tradition.

The division between classical republicans and the American framers should not be drawn too sharply. The framers of the Constitution drew a considerable amount from classical republicanism, especially insofar as they placed a high premium on political deliberation, political virtue, political debate, and citizenship. Madison and Hamilton in particular emphasized the need for deliberation among the differently situated. The basic institutions of representation, checks and balances, and federalism are best understood against this background. Even the individual rights safeguarded by the Constitution—the right to a jury trial and the rights of assembly and petition, for example—owe a large amount to the republican tradition. The framers were hardly interest-group pluralists, welfare economists, or believers in a prepolitical sphere of private rights. They were republicans, albeit of a novel stripe; they were liberals as well.<sup>3</sup>

The conventional division between the American founders and their classical predecessors is therefore far too crude. But there is certainly something to the traditional view. Respect for private preferences, rather than collective deliberation about character, public values, or the good life, seems to be a distinguishing feature of American constitutionalism. It is here, perhaps especially in recent years, that the classical legacy seems most remote and least accessible to modern democratic theory and contemporary constitutional practice.

In this essay I want to explore the question whether a contemporary democracy might not do better to concern itself directly with some of the concerns of republicanism. It is one thing to affirm competing conceptions of the good; it is quite another to suggest that private preferences should always be off-limits to politics. My goal is to see how a democratic republic, recognizing the value and even the inevitability of the American abandonment of classical republicanism, might nonetheless attempt to take advantage of those aspects of republicanism that have the strongest claim to contemporary support. A large part of my concern here is the phenomenon of endogenous preferences, a phenomenon that casts doubt on the idea that private desires and beliefs ought to be pro-

3. Indeed, participants in the liberal tradition, in its classical forms, emphasized the need for deliberation in government and placed a high value on political virtue. Many liberals do not take private preferences for granted, whatever their sources and consequences, and whatever the reasons that might be offered in their support. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

tected in all contexts.<sup>4</sup>

The argument is divided in three parts. In Part I, I invoke some fairly conventional ideas about welfare and autonomy in order to draw into doubt the claim that government should base social choices on private preferences. In Part II, I set out three categories of cases in which private preferences, as expressed in consumption choices, should be overcome. The first, directly traceable to republican commitments, includes collective desires, including considered social judgments and widely held aspirations; the second, also with republican roots, involves preferences that have adapted to unjust background conditions or undue limitations in available opportunities; the third, building on classical ideas of myopia or akrasia, includes intrapersonal collective active problems that, over a lifetime, decrease personal welfare. A democratic republic, I argue, should override private preferences in all of these cases. In Part III, I draw on the republican tradition to deal with two current controversial issues: government efforts to promote access to the media and proportional representation.

## I. PREFERENCES, DELIBERATION, AND POLITICS

Should a constitutional republic take preferences as given? In contemporary politics, law, and economics, the usual answer is affirmative. Modern economics, for example, is dominated by a conception of welfare based on the satisfaction of existing preferences; in politics and law, something called "paternalism" is disfavored in both the public and private realms.<sup>5</sup> But the idea that government ought to take preferences as

4. On the limits of preference-based theories, see Sen, *Rational Fools: A Critique of the Behavioral Foundations of Welfare Economics*, 6 PHIL. & PUB. AFF. 317 (1976); J. ELSTER, *SOUR GRAPES* (1983); Roemer, "Rational Choice" *Marxism*, in *ANALYTICAL MARXISM* (J. Roemer ed. 1986).

It might well be that literature, in addition to economics and political theory, is fruitful for exploring this subject. See M. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990); Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, in *ESSAYS ON ARISTOTLE'S ETHICS* (A. Rorty ed. 1980) [hereinafter Nussbaum, *Shame, Separateness, and Political Unity*]. It is thus no accident that writers in politics and economics sometimes draw on literature. See, e.g., J. ELSTER, *supra*.

5. There are of course criticisms within all of these fields. In economics, see Sen, *supra* note 4. In politics, see J. ELSTER, *supra* note 4. See, on the legal issues, Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

It is notable that the great expositors of liberalism in the nineteenth and twentieth centuries are emphatic in their rejection of the view that existing preferences should be taken as given, for purposes of ethics or politics. See J. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861); J. MILL, *THE SUBJECTION OF WOMEN* (1869); J. RAWLS, *A THEORY OF JUSTICE* (1971). Mill's rejection of that view is especially emphatic in his essay on Bentham, when he criticizes Bentham for the view that "[t]o say either that man should, or that he should not, take pleasure in one thing, displeasure in another, appeared to him as much an act of despotism in the moralist as in the political ruler." J. MILL, *MILL ON BENTHAM AND COLERIDGE* 68 (F.R. Leavis ed. 1950). By contrast, Mill emphasized the need to explore the influences "on the regulation of . . . affections and

they are is a quite modern one. To say this is hardly to say that the idea is without foundations. Partly a function of the perceived (though greatly overstated) difficulty of making interpersonal comparisons of utility, it is also a product of the epistemological difficulties in assessing preferences in terms of their true connection with individual welfare, and, perhaps most of all, the genuine political dangers of allowing government to engage in such inquiries.

Notwithstanding these considerations, an initial objection to the view that government should take preferences as they are might point out that whether people have a preference for a commodity, a right, or anything else is in part a function of whether the government has allocated it to them in the first instance. The decision to grant a right to one person frequently makes that person value that right more than he would if the right had been allocated to someone else. The initial allocation serves to reflect, to legitimate, and to reinforce social understandings about presumptive rights of ownership, and that allocation has a causal connection to individual perceptions about the good or right in question.

For example, a decision to give employees a right to organize, or women a right not to be subject to sexual harassment, will have an impact on social attitudes toward labor organization and sexual harassment. The allocation therefore has an effect on social attitudes toward the relevant rights and on their valuation by both current owners and would-be purchasers. And when preferences are a function of legal rules, the rules cannot, without circularity, be justified by reference to the preferences.<sup>6</sup> Because of the preference-shaping effects of the rules of allocation, it is hard to see how a government might even attempt to take preferences "as given" in any global sense.

To some degree this concern might be put to one side. Surely there is a difference between a government that concerns itself self-consciously and on an ongoing basis with private preferences and a government that sets up the basic rules of property, contract, and tort and then lets things turn out however they may. And if this distinction can be sustained, disagreements about the relationship between politics and preferences ap-

desires," and rejected "the deficiencies of a system of ethics which does not pretend to aid individuals in the formation of their own character." *Id.* at 70-71. Of course there is a difference between what a system of ethics and what a system of politics should say about that question, as Mill clearly indicated.

6. See J. ELSTER, *supra* note 4; J. RAWLS, *supra* note 5. Compare the "endowment effect" discussed in Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980); see also Knetsch & Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507 (1984); cf. Nussbaum, *Shame, Separateness, and Political Unity*, *supra* note 4.

pear to turn on competing notions of autonomy on the one hand and welfare on the other. Those who treat existing preferences as sovereign argue that this approach is most likely to promote both individual freedom, rightly conceived, and individual or social welfare.

It will be useful to begin with welfare. Even if one accepted a purely welfarist view, one might think that the process of promoting welfare should take place, not by satisfying current preferences, but by promoting those preferences and satisfying them to such an extent as is consonant with the best or highest conception of human happiness. This view is connected with older (and some current) forms of utilitarianism; it also has roots in Aristotle.<sup>7</sup> Here one does not take existing preferences as given, and one does not put all preferences on the same plane. A criterion of welfare, at least in some sense, remains the ultimate one, but on this view, the system is not focused solely on preference satisfaction. Of course a liberal republic, respectful as it should be of the need to limit government and of divergent conceptions of the good, ought generally to refrain from seeing private preferences as an object of collective concern. But the promotion of utility, rightly understood, does not always call for satisfaction of existing preferences.

A central point here, highly congenial to the republican tradition, is that preferences are shifting and endogenous rather than exogenous—endogenous to, or a function of, current information, consumption patterns, legal rules, and social pressures most generally. Because preferences are shifting and endogenous, and because the satisfaction of existing preferences might lead to unhappy or deprived lives, a political system that treats all preferences as fixed will lose important opportunities for welfare gains. At least if the relevant cases can be confidently identified in advance, and if collective action can be justified by reference to particular good reasons, the argument for democratic interference will be quite powerful. Respect for preferences that have resulted from unjust background conditions and that will lead to human misery appears hardly the proper course for a liberal republic.

For example, legal rules prohibiting or discouraging addictive behavior may have significant advantages in terms of welfare. Regulation of heroin or cigarettes—at least if the regulation can be made effective—might well increase aggregate social welfare, by decreasing harmful behavior, removing the secondary effects of those harms, and producing

7. For a modern utilitarian account along these lines, see R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1981). For an Aristotelian account, see Sen, *Well-Being, Agency, and Freedom*, 82 J. PHIL. 169 (1985).

more healthful and satisfying lives. Or government regulation of the environment or broadcasting—encouraging or requiring, for example, protection of pristine areas, nonentertainment broadcasting, or high-quality programs—may generate (or, better, prevent obstacles to generation of) new preferences, providing increased satisfaction and in the end producing considerable welfare gains. The same may well be true of antidiscrimination measures, which affect the desires and attitudes of discriminators and victims alike. A system that takes private preferences for granted will sacrifice large opportunities for social improvement on welfarist criteria. This point was a crucial one in the early stages of utilitarian thought; it has been lost more recently with the shift from older forms of welfarism to the idea of “revealed preferences.”

Moreover, the satisfaction of private preferences, whatever their content and origins, does not respond to a persuasive conception of liberty or autonomy. The notion of autonomy should refer instead to decisions reached with a full and vivid awareness of available opportunities, with all relevant information, or, most generally, without illegitimate constraints on the process of preference formation. When these conditions are not met, decisions might be described as unfree or nonautonomous. If preferences are a product of available information, of existing consumption patterns, of social pressures, and of governmental rules, it seems odd to suggest that individual freedom lies exclusively or by definition in preference satisfaction. It seems even odder to suggest that all preferences should be treated the same, independently of their origins and consequences, or of the reasons offered in their support.

Consider, for example, a decision to purchase dangerous foods, consumer products, or cigarettes by someone unaware of the serious health risks; an employer's decision not to deal with blacks because of the background of public and private segregation, or racial hostility in his community; a person who disparages or has no interest in art and literature because the culture in which he has been reared consists mostly of television; a decision of a woman to adopt a traditional gender role because of the social stigma of refusing to do so; a decision not to purchase cars equipped with seatbelts or not to wear motorcycle helmets because of the social pressures imposed by one's peer group; a lack of interest in environmental diversity resulting from personal experiences that are limited to industrialized urban areas; a decision not to employ blacks at a restaurant because of fear of violence from whites.

These examples are different from one another. The source of the problem varies in each. In all of them, however, the interest in liberty or autonomy does not call for governmental inaction, even if that were an

intelligible category. Indeed, in many of these cases regulation removes a kind of coercion.

One goal of a democratic republic, in short, is to ensure autonomy not only in the satisfaction of preferences, but also and more fundamentally in the processes of preference formation. Mill himself was emphatic on this point, going so far as to suggest that government itself should be evaluated by its effects on the character of the citizenry.<sup>8</sup> The view that freedom requires an opportunity to choose among alternatives is supplemented by the view that people should not face unjustifiable constraints on the free development of their preferences and beliefs. It is not altogether clear what such a view would require—a point to which we will return. At the very least, however, it would see a failure of autonomy, and a reason for collective response, in beliefs and preferences based on the absence of information or on insufficient opportunities.

Government action might also be justified on grounds of autonomy when the public seeks to implement, through democratic processes culminating in law, widely held social aspirations or collective desires. Individual consumption choices often diverge from collective considered judgments: people may seek, through law, to implement a democratic decision about what courses to pursue. If so, it is ordinarily no violation of autonomy to allow those considered judgments to be vindicated by governmental action. Consider a law calling for support of the arts or of high-quality broadcasting, sought by a majority of the population at large and making available opportunities not provided through market ordering. Ideas of this sort can be connected to the original constitutional belief, built on republican foundations, in deliberative democracy. Collective aspirations or considered judgments, produced by a process of deliberation in which competing perspectives are brought to bear, reflect a conception of political freedom having deep roots in the American constitutional tradition.

This different conception of autonomy places an emphasis on the freedom of collectivities or communities—a freedom embodied in decisions, reached by the citizenry, about what courses to pursue. This view is closely associated with classical republicanism, but it has resonances in Madisonian thought as well. In this view, political autonomy can be found in collective self-determination, as citizens decide, not what they “want,” but instead who they are—what their values are and what those values require. What they “want” must be supported by reasons. An

8. See J. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT*, *supra* note 5.



important form of freedom consists in precisely these processes of self-determination.

Of course there are serious risks of overreaching here, and there must be some constraints—usually denominated “rights”—on this process. Checks laid down in advance are an indispensable part of constitutional government. Those checks will include, at a minimum, basic guarantees of political liberty and personal security. Such guarantees may not be compromised by processes of collective self-determination, but citizens in any polity would be likely to make some space for processes of this sort.

## II. REPUBLICAN REJECTION OF REVEALED PREFERENCES

In this section I attempt to particularize the claims made above by cataloging cases for democratic rejection of private preferences. In all of these cases, I claim that participants in a liberal republic ought to be concerned with whether its citizens are experiencing satisfying lives and that the salutary liberal commitment to divergent conceptions of the good ought not always to be taken to disable government from expressing that concern through law. The cases fall in three basic categories: collective desires, excessive limitations in opportunities, and intrapersonal collective action problems.

### A. *Collective Desires and Aspirations*

Citizens in a democratic polity might act to embody not the preferences that they hold as private consumers, but instead what might be described as collective desires, including aspirations, “preferences about preferences,” or considered judgments. Measures of this sort are a product of deliberative processes on the part of citizens and representatives. In those processes, at least sometimes people do not simply ask what they “want.” Such measures cannot be understood as an attempt to aggregate or trade-off private preferences.

#### 1. Politics, Markets, and the Dependence of Preferences on Context

Frequently, political choices cannot easily be understood as a process of aggregating prepolitical desires. Some people may, for example, want nonentertainment broadcasting on television, even though their own consumption patterns favor situation comedies; they may seek stringent laws protecting the environment or endangered species even though they do not use the public parks or derive benefits from protection of species; they may approve of laws calling for social security and welfare

even though they do not save or give to the poor; they may support antidiscrimination laws even though their own behavior is hardly race- or gender-neutral. The choices people make as political participants are different from those they make as consumers. Democracy thus calls for an intrusion on markets.

The widespread disjunction between political and consumption choices presents something of a puzzle. Indeed, it sometimes leads to the view that market ordering is undemocratic and that choices made through the political process are a preferable basis for social ordering.

A generalization of this sort would be far too broad in light of the multiple breakdowns of the political process and the advantages of market ordering in many arenas. Respect for private markets is an important way of respecting divergent conceptions of the good and is thus properly associated with individual liberty. Respect for markets is also an engine of economic productivity, an important individual and collective goal. But it would be a mistake to suggest, as some do, that markets always reflect individual choice more reliably than politics, or that democratic choices differ from consumption outcomes only because of confusion, as voters fail to realize that they must ultimately bear the costs of the programs they favor.

Undoubtedly consumer behavior is sometimes a better or more realistic reflection of actual preferences than is political behavior. But in light of the fact that preferences depend on context, the very notion of a "better reflection" of a unitary "actual" preference is a confusing one; there is no such thing as an "actual" (in the sense of acontextual) preference in these settings. Moreover, the difference might be explained by the fact that political behavior reflects a variety of influences that are distinctive to the context of politics.

These influences include four closely related phenomena. First, citizens may seek to implement individual and collective aspirations in political behavior but not in private consumption. As citizens, people may seek the aid of the law to bring about a social state that they consider to be in some sense higher than what emerges from market ordering. Second, people may, in their capacity as political actors, attempt to satisfy altruistic or other-regarding desires, which diverge from the self-interested preferences characteristic of markets.<sup>9</sup> Third, political decisions might vindicate what might be called meta-preferences or second-order preferences. People have wishes about their wishes, and sometimes they try to vindicate those second-order wishes, or considered judgments

9. See H. MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY* (1982).

about what is best, through law. Fourth, people may precommit themselves, in democratic processes, to a course of action they consider to be in the general interest; the story of Ulysses and the Sirens is the model here. The adoption of a Constitution is itself an example of a precommitment strategy.

To point to these possibilities is not at all to deny that market or private behavior frequently reflects meta-preferences, altruism, or aspirations. There are countless counterexamples to any such claim. Divergences between market and political behavior, however, will sometimes be attributable to phenomena of this sort.

Consider, as a possible example of all these phenomena, the fact that people seem to want regulation designed to secure high quality broadcasting even though their consumption patterns favor situation comedies—a fact that helps justify certain controversial regulatory decisions by the Federal Communications Commission requiring nonentertainment broadcasting and presentations on issues of public importance. Consider as well measures designed to protect endangered species and natural preserves in the face of individual behavior that reflects little solicitude for them.

## 2. Explanations: Collective Action Problems, Deliberation, and Others

How are the differences between choices expressed in markets and those expressed in politics to be explained? There are a number of possibilities.

First, the collective character of politics, permitting a response to collective action problems, is critical here. People may not want to satisfy their meta-preferences, or to be altruistic, unless there is assurance that others will be bound to do so as well. More simply, people may prefer not to contribute to a collective benefit if donations are made individually, with no guarantee that others will participate; but their most favored system, obtainable only or best through democratic forms, might be one in which they contribute if (but only if) there is assurance that others will do so. Perhaps people feel ashamed if others are contributing and they are not; perhaps they feel victimized if they are contributing and others are not.

In any case, the satisfaction of aspirations, altruistic goals, or meta-preferences will sometimes have the characteristics of the provision of public goods or the solution of prisoners' dilemmas. Here, however, the public good is an unconventional one. The need for government is not to

satisfy private choices but instead to ensure the expression or satisfaction of desires that, precisely because of the political setting, have a distinctive character. In a democratic society, government controls are an appropriate response.

Second, the collective character of politics might overcome the problem, discussed below, of preferences and beliefs that have adapted to an unjust status quo or to limits in available opportunities. Without the possibility of collective action, the status quo may seem intractable, and private behavior will adapt accordingly. If, however, people can act in concert, preferences might take on a quite different form. Social movements involving the environment, labor, and race and sex discrimination are examples of this phenomenon. Possible democratic responses include recycling programs, energy conservation programs, and contributions to the arts, to the poor, and to environmental protection. The collective action problem thus interacts with aspirations, altruistic desires, second-order preferences, and precommitment strategies. All of these are more likely to be enacted into law in the face of collective action.

Third, social and cultural norms might incline people to express aspirational or altruistic goals more often in political behavior than in markets. Such norms may press people, in their capacity as citizens, in the direction of a concern for others or for the public interest.

Fourth, the deliberative aspects of politics, bringing additional information and perspectives to bear, may affect preferences as expressed through governmental processes. A principal function of a democratic republic is to ensure that through representative processes, new or submerged voices, or novel depictions of where interests lie and what they in fact are, can be heard and understood. It should hardly be surprising if preferences, values, and perceptions of both individual and collective interests are changed as a result of that process.

Fifth, and finally, consumption decisions are a product of the criterion of private willingness to pay, which creates distortions of its own. Willingness to pay is a function of ability to pay, and it is an extremely crude proxy for utility. Political behavior removes this distortion (which is not to say that it does not introduce distortions of its own).

These general considerations suggest that citizens in a republic might attempt to embody in law a considered judgment on their part that the choices reflected in consumption patterns ought to be overcome. A related but more narrow justification is that statutes safeguard noncommodity values—like environmental diversity—that an unregulated mar-

ket, even a well-functioning one, might protect inadequately.<sup>10</sup> Social ordering through markets may have long-term, world transforming effects that reflect collective myopia, an emphasis on short-term considerations at the expense of the future. Possible responses include promotion of high quality programming in broadcasting, of the arts, and of diversity through protection of the environment and of endangered species. In all these respects, political choices are not made by consulting given or private desires, but instead reflect a deliberative process designed to shape and reflect values.

### 3. Qualifications: Risks and Distortions

Arguments from collective desires are irresistible if the measure at issue is adopted unanimously. But more serious difficulties are produced if (as is usual) the law imposes on a minority what it regards as a burden rather than a benefit. Suppose, for example, that a majority wants to require high-quality television and to ban violent and dehumanizing shows, but that a significant minority wants to see the latter. If we put the first amendment questions aside for now, it might still be thought that those who perceive a need to bind themselves, or to express an aspiration, should not be permitted to do so if the consequence is to deprive others of an opportunity to satisfy their preferences.

The foreclosure of the preferences of the minority is unfortunate, but in general it is hard to see what argument there is for an across-the-board rule against collective action of this sort. If the majority is prohibited from vindicating its second-order or altruistic preferences through legislation, its own desires will be frustrated. The choice is between the preferences of the majority and those of the minority. On the other hand, the foreclosure of the minority probably should be permitted only when less restrictive alternatives, including private arrangements, are unavailable to serve the same end.

The argument for democratic outcomes embodying collective desires is much weaker in three categories of cases. First, if the particular choice foreclosed has some special character, it is appropriately considered a right, and the majority has no authority to intervene. Consider political expression or participation; here the equal rights of members of the minority must be respected even if a general aspiration, held by the majority, argues for selective exclusions. So too, other rights fundamen-

10. See Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983).

tal to self-actualization or self-realization—consider intimate sexual activity—ought generally to be off-limits to government.

Second, some collective desires might be objectionable or distorted. A social preference against racial intermarriage could not plausibly be justified as reflecting an aspiration or a precommitment strategy. To explain why, it is of course necessary to offer an independent argument, challenging that preference and sounding in justice. But the example suggests that the mere fact of a collective aspiration is insufficient for approval of foreclosure of private choice. The aspiration itself must not be objectionable on moral grounds.

Third, some collective desires might reflect a special weakness on the part of the majority; consider a curfew law, or perhaps prohibition. In such circumstances, a legal remedy might remove desirable incentives for private self-control, have unintended side-effects resulting from “bottling up” desires, or prove unnecessary in light of the existence of alternative remedies. When any of these three concerns arise, the case for protection of collective desires is weakened. In many contexts, however, these concerns are absent, and democratic controls initiated on these grounds are justified.

#### 4. The Sometimes Strange Idea of “Rent-seeking”

If the arguments presented in this section are persuasive, they suggest reasons to be skeptical of some normative work in the tradition of public choice theory. According to at least some of this work, much of the business of politics should be seen as “rent-seeking,” understood as the expenditure of funds on the wasteful redistribution of resources through politics rather than the production of resources through markets. The notion of “rent-seeking” rejects nearly all of the basic workings of politics. It treats citizenship itself as an evil. Efforts to enact public aspirations, to counteract discrimination, to protect the environment—all these are seen as the diversion of productive energies into a wasteful place.

This view represents a peculiar reversal of the liberal republican tradition, which has seen political behavior not as an evil, but as an important arena for education, for deliberation and discussion about the nation’s direction, for the development of the faculties, and for the cultivation of feelings of altruism. On all of these scores, the liberal republican tradition remains extremely vibrant in the United States, and it continues to describe a wide range of individual and collective behavior. It would of course be foolish to deny that much political conduct is an effort to use

governmental power to serve selfish ends and that the concept of "rent-seeking" can often help in understanding the governmental process. But to collapse all political behavior into the category of "rent-seeking" is to devalue grotesquely the activities of citizenship.

*B. Excessive Limitations in Opportunities or Unjust Background Conditions*

Citizens in a democracy might override existing preferences in order to foster and promote diverse experiences, with a view toward providing broad opportunities for the formation of preferences and beliefs, and for distance on and critical scrutiny of current desires. This rationale supports private ordering and freedom of contract as well. But it calls for collective safeguards when those forces push toward homogeneity and uniformity, as they often do in industrialized nations. Here the argument for governmental controls finds a perhaps ironic origin in Mill. Such controls are necessary to cultivate divergent conceptions of the good and to ensure a degree of reflection on those conceptions.

One might describe a system that took this goal seriously as embodying a mild form of liberal perfectionism. Such a system would see the inculcation of critical and disparate attitudes toward prevailing conceptions of the good as part of the framework of a liberal republic. Liberal education is of course the principal locus of this concern. The principles embodied in liberal education need not be confined to the school system.

Democratic measures with respect to the arts and broadcasting—subsidizing public broadcasting, ensuring a range of disparate programming, or calling for high-quality programming provided only a little or not at all by the marketplace—can be understood in these terms. Indeed, the need to provide diverse opportunities for preference formation suggests reasons to be quite skeptical of unrestricted markets in communication and broadcasting. There is a firm theoretical justification for the much-criticized, and now largely abandoned "fairness doctrine," which required broadcasters to cover controversial issues and to ensure competing views. In light of the inevitable effects of programming on character, beliefs, and even conduct, it is hardly clear that governmental "inaction" is always appropriate in a constitutional democracy; indeed the contrary seems true. (I take up this issue in more detail below.)

Moreover, market behavior is sometimes based on an effort to reduce cognitive dissonance by adjusting to undue limitations in current practices and opportunities. When this is so, respect for preferences seems unjustified on grounds of autonomy and perhaps welfare as well.

In these circumstances, preferences are nonautonomous insofar as they are reflexively adaptive<sup>11</sup> to unjust background conditions; collective responses to such preferences might yield welfare gains as well. The point has large implications. For example, workers appear to underestimate the risks of hazardous activity partly in order to reduce the dissonance that would be produced by an understanding of the real dangers of the workplace.<sup>12</sup> Democratic controls might produce gains in terms of both welfare and autonomy.

Similar ideas help account for antidiscrimination principles. Most generally, the beliefs of both beneficiaries and victims of existing injustice are affected by dissonance-reducing strategies.<sup>13</sup> The phenomenon of blaming the victim has distinct cognitive and motivational foundations. A central point here is that the strategy of blaming the victim, or assuming that an injury or an inequality was deserved or inevitable, tends to permit nonvictims or members of advantaged groups to reduce dissonance by assuming that the world is just—a pervasive, insistent, and sometimes irrationally held belief.<sup>14</sup> The reduction of cognitive dissonance is a powerful motivational force, and it operates as a significant obstacle to the recognition of social injustice or irrationality.

Victims also participate in dissonance-reducing strategies, including the lowering of self-esteem to accommodate both the fact of victimization and the belief that the world is essentially just. Sometimes it appears easier to assume that one's suffering is warranted than to believe it has been imposed cruelly or by mere chance. Consider here the astonishing fact that after a draft lottery, those with both favorable and unfavorable results decided that the outcomes of the purely random process were de-

11. There is a difference between self-conscious adaptation to an intractable status quo and the sorts of processes I am describing. If a person without musical talent decides that he will counteract and revise his desire to be a world-famous pianist, it would be odd to find that (healthy) decision to be inconsistent with personal autonomy. The cases under discussion involve a reflexive process based on an absence, socially produced, of sufficient opportunities. Of course the notion of sufficient opportunities itself requires a baseline; every system contains limited opportunities.

12. See Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982).

13. On cognitive dissonance, see L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); on its implications for social theory, welfare, and autonomy, see J. ELSTER, *supra* note 4.

See also M. WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (1792), which can be seen as an extended discussion of the social formation of preferences and the phenomenon of the adaptation of preferences, beliefs, and desires to an unjust status quo. Thus Wollstonecraft writes, "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative." *Id.* at 43. Similar points are made in J. MILL, *THE SUBJECTION OF WOMEN*, *supra* note 5, as against the claim that the existing desires of women are a product of consent.

14. See M. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980).



served.<sup>15</sup> The phenomenon of blaming the victim also reflects the "hindsight effect," through which people unjustifiably perceive events as more predictable than they in fact were, and therefore suggest that victims or disadvantaged groups should have been able to prevent the negative outcome. All this makes reliance on existing or revealed preferences highly problematic in certain contexts.

There is suggestive evidence in the psychological literature to this effect. Some work here reveals that people who engage in cruel behavior change their attitudes toward the objects of their cruelty and thus devalue them; observers tend to do the same.<sup>16</sup> Such evidence bears on antidiscrimination law in general. Aspects of American labor and race discrimination law can be understood as a response to the basic problem of distorted beliefs and preferences.<sup>17</sup> There are implications here for sex discrimination as well. The movement for the elimination of sex discrimination is informed by an understanding that many women—as well as many men—have adapted to an unjust status quo.

Sometimes, moreover, preferences are only imperfectly adapted. At some level there is a perception of an injury, but a fear of social sanctions or a belief that the cause is intractable prevents people from seeking redress. Here the collective character of politics, permitting the organization of numerous people, can be exceedingly helpful.

Standing by itself, the fact that preferences are shifting and endogenous is hardly a sufficient reason for democratic controls. All preferences are to some degree dependent on existing law and current opportunities, and that fact cannot be a reason for government action without creating a license for tyranny. The argument for democratic controls in the face of endogenous preferences must rely on a belief that welfare or autonomy will thereby be promoted. Usually, of course, governmental interference should be avoided. Too often, however, the salutary belief in respect for divergent conceptions of the good is transformed into an unwillingness to protect people from unjust background conditions or a sheer lack of options.

The actual content of democratic controls will be controversial, and it probably should begin and usually end with efforts to provide information and to increase opportunities. Thus, for example, governmentally required disclosure of risks in the workplace is a highly plausible strat-

15. Rubin & Peplau, *Belief in a Just World and Reaction to Another's Lot: A Study of Participants in the National Draft Lottery*, 29 J. SOC. ISSUES, 73, 84-85 (1973).

16. See M. LERNER, *supra* note 14.

17. See Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

egy. In a few cases, however, these milder strategies may be inadequate, and coercion is necessary.

The category of democratic responses to endogenous preferences of this sort overlaps with that of measures that attempt to protect collective aspirations. Frequently aspirations might form the basis for laws that attempt to influence processes of preference formation.

### *C. Intrapersonal Collective Action Problems*

There is also a case for democratic controls on existing preferences when such preferences are a function of past acts of consumption and when such acts alter desires or beliefs in such a way as to cause long-term harm. Here the purpose of collective controls is to affect the development of certain preferences. Preferences are endogenous not to existing legal rules or to limited opportunities but to past consumption decisions, and in the cases at hand, the effect of those decisions on current preferences is pernicious. For government to act in this context, it is important that it be confident of its conclusions. An absence of information on the part of the private actors is usually a necessary condition for collective controls.

Regulation of addictive substances, of myopia, and of habits are familiar examples. In the case of an addiction, the problem is that the costs of nonconsumption increase dramatically over time, as the benefits of consumption remain constant or fall sharply. The result is that the aggregate costs, over time or over a life, of consumption exceed the aggregate benefits, even though the initial consumption choice provides benefits that exceed costs. Individual behavior that is rational for each individual consumption choice ultimately leads people into severely inferior social states. In such cases, people, if fully informed, would in all likelihood not want to become involved with the good in the first place. Government action is a possible response.

Menachem Yaari offers the example of a group of traders attempting to induce alcoholism in an Indian tribe.<sup>18</sup> At the outset alcoholic beverages are not extremely valuable to consumers. The consumers are willing to buy only for a low price, which the traders willingly offer. But as a result of past consumption, the value of the beverages to the consumers steadily increases, to the point where they are willing to pay enormous sums to obtain them. Thus the traders are able:

to manoeuvre the Indian into a position where rationality conflicts

18. Yaari, *Endogenous Changes in Tastes: A Philosophical Discussion*, in *DECISION THEORY AND SOCIAL ETHICS: ISSUES IN SOCIAL CHOICE* 59 (H. Gottinger & W. Leinfellner eds. 1978).

with Pareto efficiency, *i.e.*, into a position where to be efficient is to be irrational and to be irrational is to be efficient . . . . The disadvantage, for an economic unit, of having endogenously changing tastes is that, even with perfect information and perfect foresight, the unit may find itself forced to follow an action which, by the unit's own standards, is Pareto-dominated.<sup>19</sup>

Because of the effect of consumption, over time, on preferences, someone who is addicted to heroin is much worse off even though the original decision to consume was not irrational if one looks only at immediate costs and benefits. Statutes that regulate addictive substances respond to a social belief that the relevant preferences should not be formed in the first place.

We might describe this situation as involving an intrapersonal collective action problem,<sup>20</sup> in which the costs and benefits, within a particular person, of engaging in the relevant activity change dramatically over time. Related phenomena were of course an important part of classical philosophy, particularly in the treatment of the problems of myopia and akrasia. A central point is that consumption patterns induce a significant change in preferences, and in a way that makes people worse off in the long-run.<sup>21</sup> An addiction is the most obvious case, but it is part of a far broader category. Consider, for example, myopic behavior, defined as a refusal—because the short-term costs exceed the short-term benefits—to engage in activity having long-term benefits that dwarf long-term costs. Another kind of intrapersonal collective action problem is produced by habits, in which people engage in behavior because of the subjectively high short-term costs of changing their behavior notwithstanding the fact that the long-term benefits exceed the short-term benefits. Akrasia, or weakness of the will, has a related structure, and some laws respond to its individual or collective forms.

For the most part, problems of this sort are best addressed at the individual level or through private associations, which minimize coercion; but social regulation is a possible response. Statutes that subsidize the arts or public broadcasting, or that discourage the formation of some habits and encourage the formation of others, are illustrations. So too with legal requirements that manufacturers install seat belts or that people buckle them. The subjective costs of buckling decrease over time.

19. *Id.* at 82.

20. Elster, *Weakness of Will and the Free-Rider Problem*, 1 *ECON. & PHIL.* 231 (1985); Schelling, *Economics, or the Art of Self-Management*, 68 *AM. ECON. REV.* 290 (1978).

21. Of course all consumption has an effect on preferences. For example, exposure to classical music usually increases appreciation. But the pattern under discussion is a rare one; it is that pattern, producing miserable lives, to which a democracy might respond. To be sure, in practice the response might make things worse rather than better.

Once people are in the habit of buckling, the costs become minimal. The fact that the costs shrink rapidly after the habit of buckling has formed counts in favor of regulation, certainly on welfare grounds, and perhaps on autonomy grounds as well. There is a similar argument for compulsory recycling programs and for democratic restrictions on smoking cigarettes.<sup>22</sup>

The problem with collective controls in this context is that they are unlikely to be fine-tuned; they often will sweep up so many people and circumstances as to create serious risks of abuse. In some settings, however, citizens will be able to say with confidence that the effect of consumption on preferences will lead to severe welfare or autonomy losses. In such cases democratic controls are justified.

### III. EXAMPLES: OVERRIDING PREFERENCES IN A DEMOCRATIC REPUBLIC

#### A. *Government and the Airwaves*

There is a growing consensus that the government should not concern itself with the airwaves and that total reliance on private markets and consumer preferences is the appropriate strategy for government. In this view, broadcasting should be treated like soap, or cereal, or any other commodity. Indeed, there is a growing consensus that this result is ordained by the first amendment. If the claims made here are persuasive, however, the consensus is misguided.

The consequence of market-based strategies in broadcasting is a system in which most viewers see shows that deal rarely with serious problems; are frequently sensationalistic, prurient, dehumanizing, or banal; reflect and perpetuate a bland, watered-down version of the most conventional views about politics and morality; are influenced excessively by the concerns of advertisers; and often are riddled with violence, sexism, and racism. It simply defies belief to suggest that such shows do not affect the beliefs and even the character of the citizenry. Is it so clear that a constitutional democracy ought to consider itself disabled from responding to this situation? Is it so clear that a first amendment enacted in order to ensure democratic self-determination bars a democratic corrective here?

In my view, the considerations marshaled thus far suggest that citizens in a constitutional democracy ought to be conceded the power, and ought to exercise the power, to engage in a wide range of controls. These

22. See R. GOODIN, *NO SMOKING: THE ETHICAL ISSUES* (1989).

include the power to regulate advertising on television, certainly for children, but for others as well; to require broadcasters to pay attention to public affairs, as in, for example, an hour of compulsory programming per night; to ban gratuitous or prurient violence on television, especially when it is sexualized; to require, as a condition for licensing, a subsidy to public television; and to impose a broad fairness doctrine, in the form not only of an obligation of attention to important issues but also a chance to speak for divergent sides. There would be a wide range of collective and external benefits from such controls, which would thus carry forward a strand of the liberal tradition that calls for government action in such cases.<sup>23</sup>

At least in principle, rights of private access to the media for differing positions ought to be thought congenial to the free speech guarantee. Surely this is so if that guarantee is understood as a protection of a deliberative process centered on public values rather than of a mere "market-place." The first amendment should not be seen as an obstacle to such efforts. If anything, the existing system might be thought to raise serious constitutional questions. A system in which access to the media, with inevitable consequences for the shaping of preferences and beliefs, is made dependent on private willingness to pay raises genuine problems for free expression.<sup>24</sup>

### *B. Proportional Representation*

In recent years, there has been a revival of interest in systems of proportional or group representation. Blacks, women, the handicapped, and other disadvantaged groups often have had little success in the ordinary electoral process. There is a solid constitutional pedigree for group representation, notwithstanding the constant and emphatic rejections by the Supreme Court of constitutionally-based arguments for representation of members of racial minority groups. Despite the rigidity of the "one person, one vote" formula, with its majoritarian and individualistic overtones, group representation always has been an important feature of American constitutionalism.<sup>25</sup>

Moreover, the basic constitutional institutions of federalism, bicam-

23. See, e.g., J. MILL, *PRINCIPLES OF POLITICAL ECONOMY* (1871).

24. The Supreme Court seemed to recognize this point in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but the point has dropped out of the current debate.

25. At the time of the framing, for example, geography was thought to define distinct communities with distinct interests; representation of the states as such seemed only natural. It would not be impossible to argue that racial and ethnic groups (among others) are the contemporary analogue to groups that were defined in geographical terms during the founding period.

eralism, and checks and balances, share some of the appeal of proportional representation, and owe their origins in part to notions of group representation. These institutions proliferate the points of access to government, increasing the ability of diverse groups to influence policy, multiplying perspectives in government, and improving deliberative capacities. In this respect, they ensure something in the way of group representation, at least when compared with unitary systems. Of course both the separation of powers and bicameralism grow in part out of efforts to promote representation of diverse groups: bicameralism allowed representation of the wealthy and the masses; the notion of separation derived from notions of mixed government, which was designed to ensure a measure of representation of groups defined in social and economic terms.

Proportional representation might be designed to ensure representation in the legislature of all groups able to attain more than a minimal share of the vote. In another form, the system might be designed to ensure that members of disadvantaged groups are given the power to exert influence on political outcomes.

There are serious problems with both of these efforts, and I do not mean to evaluate them in detail here. I do suggest that efforts to ensure proportional representation become much more plausible if they are justified on grounds that do not take preferences as given and if they emphasize the preference-shaping effects of discussion and disagreement in politics.<sup>26</sup> The argument here is that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups have access to the process. Group representation, precisely by having this effect, would ensure that diverse views are expressed on an ongoing basis in the representative process, where they might otherwise be excluded. In this respect, group representation would be a kind of second-best solution for the real-world failures of Madisonian deliberation. And the purpose of access is not primarily to allow each group to have its "piece of the action"—though that is not entirely irrelevant—but instead to ensure that the process of deliberation is not distorted by the mistaken appearance of a common set of interests on the part of all concerned. In this incarnation, proportional representation is designed to increase the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected. That process should

26. In part this is Mill's defense of such efforts. See J. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT*, *supra* note 5. See also Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250 (1989).

facilitate the healthy expression of collective values or aspirations and the scrutiny of preferences adaptive to unjust background conditions or limited opportunities.

For this reason, proportional representation may be the functional analogue of the institutions of checks and balances and federalism, recognizing the creative functions of disagreement and multiple perspectives for the governmental process. In this sense there is continuity between recent proposals for proportional representation and some of the attractive features of the original constitutional regime. Indeed, Hamilton himself emphasized that in a system of checks and balances, the "jarring of parties . . . [will] promote deliberation."<sup>27</sup> If this is so, proportional representation is most understandable in a democracy that does not take preferences as given.

#### IV. CONCLUSION

Much of the appeal of the republican tradition lies in its emphasis on a conception of political life that does not treat private preferences as the foundation of social choice. Those who partake of the republican tradition—for these purposes, a capacious category including writers from Aristotle to Rawls—insist that political institutions have inevitable consequences for preferences and beliefs. A large task of constitutional design, and for the development of legal rules in general, is to ensure that those consequences are favorable rather than unfavorable.

To say this is not at all to suggest that a republican polity ought to impose on its citizens a unitary conception of the good. A general respect for diversity in individual choice is indispensable in modern systems. Such respect does not, however, entail protection for existing preferences, regardless of their origins or consequences, or of the reasons that might be offered in their behalf.

I have suggested that the classical tradition continues to provide guidance for those interested in the evaluation of preferences and beliefs and in the connections between these and existing institutional arrangements. Above all, perhaps, the classical tradition suggests reasons not to tolerate a system without property rights or containing systemic poverty. A system without property, or with property, has stultifying effects on the free development of personality and simultaneously poses a threat to the independence and security of its people, which are prerequisites for republican citizenship. But the classical tradition also suggests the need to

27. THE FEDERALIST NO. 70, at 427 (A. Hamilton)(C. Rossiter ed. 1961).

respect collective aspirations, to respond to preferences and beliefs formed by unjust background institutions, and to overcome the sorts of intrapersonal collective action problems manifested in addiction, myopic behavior, and akrasia.

To warrant respect, such a system should be liberal as well as republican. Indeed, it should see its liberalism as operating in close alliance with its republicanism. To say that preferences ought not always be the basis of social choice is hardly to say that collectivities generally should override individual choices. It is, however, to say that government cannot avoid the task of allocating rights and entitlements in the first instance, that existing institutions and allocations will inevitably affect preferences and beliefs, and that a political system ought to attempt to ensure that preferences will be formed and expressed under conditions that promote rather than undermine liberty and welfare, and that reflect the diverse social goods that lie underneath both of these, properly conceived. It is on this issue, perhaps above all, that the republican tradition has much to offer contemporary legal and political thought.



